Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-891

EDGAR PAUL, Chief of Police, Louisville Division of Police, and RUSSELL MCDANIEL, Chief of Police, Jefferson County Division of Police,

Petitioners,

—v.—

EDWARD CHARLES DAVIS, III,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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In The
SUPREME COURT OF THE UNITED STATES
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RUSSELL McDANIEL, Chief of Police, Jefferson County Division of Police,

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-v.-

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether law enforcement officials may, consistent with the constitutional right of privacy, as guaranteed by the Fourteenth Amendment's due process clause, disseminate to large segments of the public, flyers

containing the names and photographs of persons who have been arrested for, but not convicted of, the offense of shoplifting, and describing these persons as "active shoplifters," together with persons who have been convicted of the offense?

2. Whether law enforcement officials may, consistent with the Fourteenth Amendment's guarantee of procedural due process, disseminate to large segments of the public, flyers containing the names and photographs of persons described by said law enforcement officials as "active shoplifters," without first affording such persons a hearing on the question of whether they are in fact "active shoplifters?"

STATEMENT OF THE CASE

The respondent essentially agrees with the Statement of the Case as set forth by the petitioners except insofar as the petitioners intimate that the flyer in question was not widely disseminated. The complaint alleged that the petitioners had caused the flyers to be sent "to numerous merchants and business establishments in the Louisville Metropolitan area," and at the hearing on the motion for a

preliminary injunction the petitioner Paul testified that about 800 of the flyers had been distributed. (App., p. 22). The petitioners also neglect to inform the Court that the practice of sending out the flyers had been discontinued beginning with the 1973 Christmas season, although at that time the respondent's complaint had been dismissed by the District Court.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I.

The Petitioners Have Advanced No "Special and Important Reasons" Justifying the Exercise of This Court's Discretionary Jurisdiction on Certiorari.

The sole reason for granting certiorari that the petitioners have advanced is that this Court should determine whether the Court of Appeals erred in reversing the judgment of the District Court. The petitioners seem to be totally unaware of the considerations governing review on certiorari that are set forth in Rule 19 and of this Court's long-standing remainder to disappointed litigants that, "The jurisdiction [on certiorari] was not conferred upon this

Court merely to give the defeated party in the Circuit Court of Appeals another hearing." Magnum Co. v. Coty, 262 U.S. 159, 163 (1923). They do not allege, let alone show, that the decision of the Court of Appeals is in conflict with the decision of another Court of Appeals on the same matter, or that it is in conflict with applicable decisions of this Court, nor do they even suggest that the question of the power of police departments to brand persons who have not been convicted of any crime as "active shoplifters" is an important one, because many police departments engage in this practice. Indeed, the Louisville and Jefferson County police departments have themselves abandoned this practice, even after the District Court had upheld its constitutionality. Even if the Court of Appeals erred - which it clearly did not - it is not the function of this Court to review erroneous decisions of Courts of Appeals on certiorari, and the petitioners have advanced no plausible reasons why this Court should grant certiorari in the case at bar.

II.

The Court of Appeals Was Clearly Correct in Holding That the Complaint Alleged a Violation of Federal Constitutional Rights

The essential argument of the petitioners is that what they did was not violative of the constitutional right of privacy, because every tort committed by government officials does not constitute a violation of the constitutional right of privacy, a proposition that the respondent does not dispute. It is not contended, for example, as in Baker v. Howard, 419 F.2d 376 (9th Cir. 1969), relied on by the petitioners, that the furnishing of information by police officers indicating that a person has committed a crime is violative of constitutional rights. But it is a far different matter when police departments disseminate 800 flyers containing the names and "mug shots" of many persons, coupled with a declaration of active criminality and the classifications of these persons, who have not been convicted of any offense, together with convicted criminals. As the Court of Appeals found, the branding of a person as an "active shoplifter" by police authorities and the

dissemination of this branding to substantial segments of the community without any kind of hearing whatsoever, is unconstitutional under this Court's holding in Wisconsin v. Constantineau. 400 U.S. 433 (1971). Moreover, as a matter of substantive due process, in which the constitutional right of privacy is rooted, Roe v. Wade, 410 U.S. 113 (1973), the state may not infer active criminality from the mere fact of arrest. As the Court of Appeals concluded:

> "Few things are as fundamental to our legal system as the presumption of innocence until overcome by proof of guilt beyond a reasonable doubt at a fair trial. The dissemination of the flyer in the case at bar is in the face of the presumption of innocence, disregards the Due Process Clause and is based on evidence that is not probative of guilt.
>
> Condemning a man to a suspect class without a trial and on a wholly impermissible standard, as in the case at bar, offends the very essence of the Due Process Clause, i.e., protection of the individual against arbitrary action." (App., pp. 28-29).

Both in terms of procedural and substantive due process, the actions of the petitioners in the case at bar were patently unconstitutional.

Even if it were this Court's practice on certiorari to review the correctness of decisions of Courts of Appeal, the decision of the Court of Appeals in the case at bar was clearly correct.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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